

EXHIBIT A

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN WILLIAM KAIPON ENOS, an
individual and JOHNSON
ENTERTAINMENT, LLC, a Native
Hawaii limited liability company,

Plaintiffs,

v.

THE WALT DISNEY COMPANY, a
Delaware corporation; DISNEY
ENTERPRISES, INC., a Delaware
corporation; and DOES 1-10, inclusive,

Defendants.

CASE NO. 2:23-cv-05790-DSF-AGR^x

Hon. Dale S. Fischer

**EXPERT REPORT OF ELLEN
SEITER**

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I. INTRODUCTION

I have been retained by counsel for Defendants The Walt Disney Company and Disney Enterprises, Inc. (referred to together as “Defendants”) to provide my opinions on whether there exist any similarities in protectable expression between (i) “Olu Mel,” one of Defendants’ characters in the “Duffy and Friends” franchise, and (ii) a mascot called “Honu” that was allegedly created by (or on behalf of) Plaintiffs John William Kaipo Enos (“Enos”) and Johnson Entertainment, LLC (together, “Plaintiffs”).

In preparing my opinions, I have considered Plaintiffs’ first amended complaint, reviewed Plaintiffs’ deposition transcript, supplemental materials, and exhibits, including visual imagery and theatrical scripts, and including the materials cited in this report, and compared Plaintiffs’ Honu to Defendants’ ‘Olu Mel. Based on these materials, and my own research performed specifically for the case, I have formed an opinion about the alleged similarities between Honu and ‘Olu Mel. As an expert in children’s media and entertainment, my opinion is that any similarities between Honu and ‘Olu Mel exist in prior depictions of animated turtles and are attributable to features that are not original to the Plaintiffs. It is further my opinion that, even when the allegedly shared features are considered in combination, the combination of elements is not original to Plaintiffs, and, the particular combination of elements is not shared between Honu and ‘Olu Mel.

In reviewing Plaintiffs’ materials and exhibits, I noted a distinction between the version of Honu developed and published in or around 2013 (referred to simply as “Honu”), and a separate version of Honu depicted with a ukulele (referred to as “Ukulele Honu”), which I understand was first published in 2018. I believe this distinction is important, because I have been informed, and reviewed documents indicating, that Defendants’ development of a ukulele-playing turtle began in 2015, and that the design of ‘Olu Mel was substantially completed by 2016, prior to the publication of Ukulele Honu in 2018.

I am being compensated at a rate of \$500 per hour, plus reasonable expenses, for my work in preparing this report and forming the opinions discussed herein. I understand that I may be called upon to testify as to the opinions stated in this report, and if that happens, I will be compensated at a rate of \$700 per hour for the time I spend giving testimony. In the event that I need to travel as part of my work on this litigation, I will be compensated \$100 per hour for nonwork travel time, plus reasonable out-of-pocket expenses. I have received no additional compensation for my work in this litigation, and my compensation does not depend upon the contents of this report, the nature of any opinions I form in connection with this litigation, any testimony I may provide, or the ultimate outcome of this litigation.

II. SUMMARY OF OPINIONS

Based on my extensive experience in children’s media and marketing, my career in media studies as a tenured professor and endowed chair at major U.S. universities and abroad, my familiarity with characters and products developed with children as the target audience, and my review of the materials identified and cited in this report, I have developed the following opinions:

1. Any traits shared by Honu and ‘Olu Mel are commonplace conventions in the children’s entertainment genre, and are not original to Plaintiffs.
2. The depiction of a character associated with Hawaii playing a ukulele is not original to Plaintiffs.

3. Even the combination of traits shared by Honu and ‘Olu Mel is not original to the Plaintiffs.
4. There are stark differences between Honu and ‘Olu Mel, including with respect to their shared traits.

III. QUALIFICATIONS

In forming the opinions stated in this report, I have drawn on my decades of experience researching, writing and publishing about cinema and media studies, including a specialization in the genre of children’s entertainment. My education, publications, and professional activities all contribute to my experience in the discipline of cinema and media studies, and children’s entertainment more specifically. I am identifying my most relevant qualifications below, and my complete curricula vitae is attached to this report as Appendix A.

Relevant Academic Experience. I am the Director of the Academy of Film, and Chair Professor of Film and Media Studies, at the Hong Kong Baptist University, Kowloon, Hong Kong Special Administrative Region. I took on that role in the Spring of 2022. Before joining the faculty of the Hong Kong Baptist University, I was a professor of Cinema and Media Studies and Steven K. Nenno Chair of Television Studies at the School for Cinematic Arts, University of Southern California (“USC”). I was a member of the faculty of USC from 2003 until 2022. Before that, I was a professor in the Department of Communication at the University of California, San Diego from 1995 until 2003. I was also a professor of Telecommunications and Film at Indiana University, from 1993 to 1995, and at the University of Oregon, Eugene from 1987 until 1993—and I was an assistant professor at the University of Oregon, Eugene from 1981 until 1987.

Education. I received a Ph.D. from Northwestern University, Radio-TV-Film, in 1981. My dissertation was “The Promise of Melodrama: Recent Women’s Films and Soap Operas.” I also hold a Masters of Fine Arts from Northwestern University, Radio-TV-Film, which I received in 1978. I received a Bachelor of Arts in Anthropology from the University of California, Los Angeles, in 1976.

Selected Publications. During the course of my career, I have published many books and articles on the subjects of television, film, and children’s entertainment and marketing. For the purpose of this report, I am highlighting below my most relevant publications. Additional publications may be found in Appendix A.

Books

- Ellen Seiter, co-author with William J. Seiter, *A Creative Artist’s Legal Guide: Copyright, Trademark and Contracts for Film and Digital Media Production*, Yale University Press, Spring 2012;
- Ellen Seiter, *The Internet Playground: Children’s Entertainment, Access and MisEducation* (New York: Peter Lang, 2005);
- Ellen Seiter, *Sold Separately: Children and Parents in Consumer Culture* (New Brunswick, New Jersey: Rutgers University Press, 1993).

Articles

- “The Internet Playground” in Toys, Games and Media, Eds. Jeffrey Goldstein, David Buckingham and Gilles Brougere, Lawrence Erlbaum, 2004;
- “Children Reporting On-Line: The Cultural Politics of the Computer Lab” Television and New Media, 5, 2004;
- “After Saturday Morning: Diversifying Children’s Television” in The Nickelodeon Book, Ed. Heather Hendershot, New York University press, 2004;
- “Gotta Catch ‘Em All Pokemon: Problems in the Study of Children’s Global Multimedia” Research in Childhood Sociology, Culture and History, Ed. Flemming Mouritzen, University of Southern Denmark, Odense, Denmark;
- “Mighty Morphin’ Four Year Olds: Heroes, Gun play and Socialization” in Bang Bang, Shoot Shoot! Essays on Guns and Popular Culture, Eds. Murray Pomerance and John Sakeris (Needham Heights, MA: Simon and Schuster, 1999 and revised edition 2000);
- “Power Rangers at Preschool: Negotiating Media in Child Care Settings” in Children’s Media Culture Ed. Marsha Kinder (Durham: Duke University Press, 1999);
- “Mothers Watching Children Watching Television” in The Production of Feminist Cultural Theory Ed. Beverly Skeggs (Manchester: Manchester University Press, 1996);
- “Notes on Children as a Television Audience“ in The Audience and Its Landscape Eds. James Hay, Larry Grossberg and Ellen Wartella (Boulder, Colorado: Westview Press, 1996);
- “Toy-Based Video for Girls: My Little Pony” in In Front of the Children, Eds. Cary Bazalgette and David Buckingham (London: British Film Institute, 1995);

Editorial Work

- Founding Co-Editor, International Journal of Learning and Media, MIT Press, 2010-2012;

The MacArthur Report Series in Digital Media and Learning are commissioned white papers focusing on concepts and topic areas key to the understanding of digital media and learning. The series is published by the Digital Media and Learning Research Hub and by MIT Press and I served as its editor.

Professional Consulting Work

- Bayerischer Rundfunk (Bavarian Television, Munich) Institute for the Study of Children and Television;
- Mattel Corporation, Project Platypus;

- Interval Research Corporation, Forum speaker;
- Sega of America: Parents Advisory Council;
- Microsoft Corporation, Kids Network Advisory Council.

IV. PRIOR LAWSUITS

In the four (4) years preceding this report, I testified as an expert at trial or by deposition in the following case: *Moonbug Entm't Ltd. v. BabyBus (Fujian) Network Tech. Co., Ltd.*, Case No. 21-CV-06536-EMC (N.D. Cal.).

V. BACKGROUND INFORMATION INFORMING MY OPINIONS

Based on the documents and testimony that I have reviewed and considered, I have developed an understanding of the development of both Honu and ‘Olu Mel that I relied upon in formulating the opinions presented in this report.

A. Honu

From my review of Plaintiffs’ complaint in this action, I understand that Plaintiffs contend that Honu is the “main character” of “Honu by the Sea,” a live musical show comprised of a “series of musical compositions and animated characters” created by Mr. Enos in or around 2006.¹ However, my review of the deposition testimony of Mr. Enos, as well as documents produced by Mr. Enos in discovery, indicates a different story.

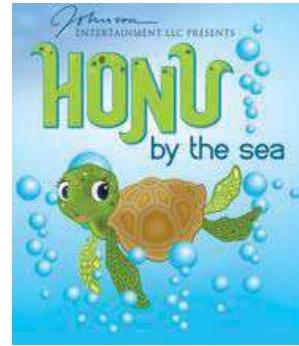
My understanding is that in 2006 when Mr. Enos first began developing the musical show that would eventually become “Honu by the Sea,” he started by writing songs. I further understand that the first performance of “Honu by the Sea” occurred in 2012, with slightly different versions occurring thereafter. I have reviewed the scripts for multiple versions of “Honu by the Sea,” and also considered Mr. Enos’ deposition testimony on the subject. Based on the scripts and Mr. Enos’ testimony, there is no character named Honu that is part of the story line of the show or depicted as a character in any iteration of the show. Instead, the “Honu” referenced in the title of the show “Honu by the Sea” uses “Honu” (the Hawaiian word for turtle) to refer to a female turtle character named Malia, as well as Malia’s mother, Lehua, in a skeletal story about rescuing Lehua, who is entrapped by garbage on the ocean floor.²

With respect to visual depictions of cartoon turtles associated with “Honu by the Sea,” I understand that Plaintiffs initially utilized the image below, which Mr. Enos described as depicting Malia, not Honu³:

¹ First Amended Complaint.

² Transcript of Deposition of John William Kaipo Enos dated August 21, 2024, at 26:5-18, 70:13-16 and Ex. 1 (PL00486).

³ Transcript of Deposition of John William Kaipo Enos dated August 21, 2024, at 76:12-77:17 and Ex. 3.



I further understand, based on documents I have reviewed, including a social media post on Plaintiffs' Facebook account, that Plaintiffs continued to utilize this image of "Malia" through at least 2015.

It is my understanding that the first visual depiction of the turtle that Mr. Enos refers to as Honu was created in the fall of 2013, by an individual named Michael Furuya. The version of Honu is reflected below (Enos Depo., Ex. 12):



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It is my understanding that Plaintiffs began utilizing "Honu" as a mascot for the "Honu By The Sea" show in 2015.⁵

I have also been informed that the earliest image produced by Plaintiffs of Honu with a ukulele, *i.e.*, Ukulele Honu, dates to April 28, 2016, and is reflected below:



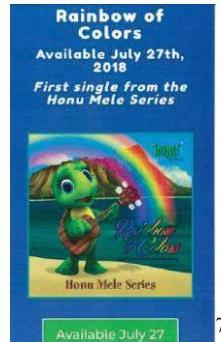
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⁴ PL00592.

⁵ Transcript of Deposition of John William Kaipo Enos dated August 21, 2024, at 54:16-19, 187:7-11.

⁶ PL00773.

I further understand that Plaintiffs did not publicly display Ukulele Honu until on or about July 27, 2018, as reflected below:



B. 'Olu Mel

My understanding is that 'Olu Mel is a character created as part of Defendants' broader "Duffy and Friends" franchise. Duffy, a teddy bear and the initial character in that franchise, dates back to 2002.⁸ Duffy's "Friends" include ShellieMay (also a teddy bear), Gelatoni (an artistic cat), StellaLou (a rabbit that loves dancing), and CookieAnn (a dog with a propensity for cooking).

I have been informed that, in or around the spring of 2015, an employee or employees in Disney's consumer products group came up with the idea of developing a Duffy "Friend" for Disney's Aulani Resort in Hawaii. The "Duffy and Friends" franchise was particularly popular with Japanese consumers, who also comprised a significant portion of the guests at Aulani. In light of its strong connection to Hawaii, it was quickly decided that the new character would be a turtle, and that the character would be musical in nature. Again, considering its connection to Hawaii, the ukulele was imagined to be one of the new character's primary instruments.⁹ My understanding is that this concept of a ukulele-playing turtle character was developed in late 2015/early 2016.¹⁰

I further understand that the actual design of the new character—who would eventually come to be called 'Olu Mel—took place between approximately late 2015 and the summer of 2016. Early images of 'Olu Mel were developed by no later than December 2015, as reflected in the image below:



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Early images of 'Olu Mel, with blue eyes and playing a ukulele, were developed no later than February 2016, as reflected in the image below:

⁷ PL00245; *see also* Transcript of Deposition of John William Kaipo Enos dated August 21, 2024, at 192:12-18 and Ex. 16.

⁸ <https://sites.disney.com/waltdisneyimagineering/duffy-the-disney-bear/>.

⁹ Transcript of Deposition of Fabiola Garza dated November 13, 2024, at 51:2-14.

¹⁰ *Id.*, at 19:22-24, 34:2-12, 35:21-24.

¹¹ TWDC-OLU000045-46.



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By March 2016, the design of 'Olu Mel evolved further:



By August 2016, 'Olu Mel had evolved to very near to its final appearance. From visual inspection alone, it appears that primary changes were made to conform 'Olu Mel to other Duffy and Friends characters, including by making the colors more pastel, adding a Mickey Mouse silhouette to the face, giving the character a younger look, and making the eyes more button-like, akin to a teddy bear and similar to all other Duffy and Friends characters:



Images of 'Olu Mel appearing as he appears today were developed by no later than January 2017:

¹² TWDC-OLU000054-55.

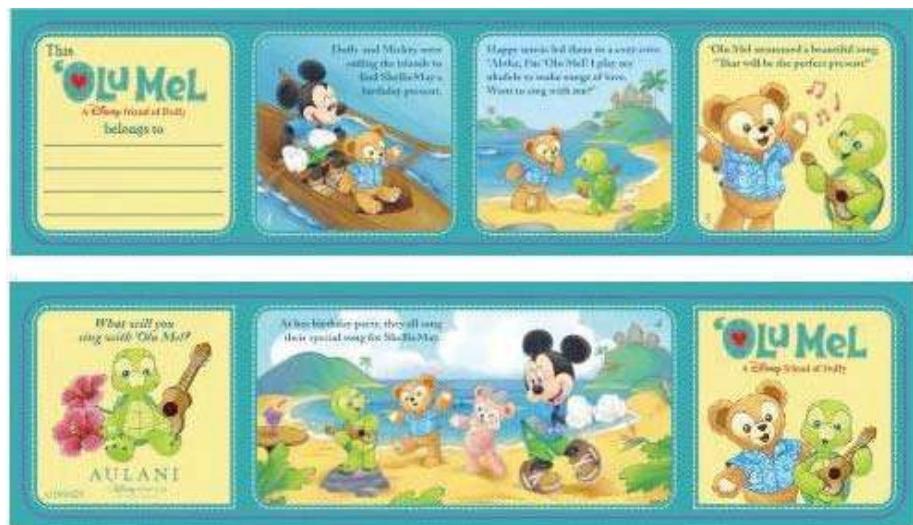
¹³ TWDC-OLU000089-90.

¹⁴ TWDC-OLU000099-100.



I understand Defendants announced ‘Olu Mel on or about July 20, 2018, with the character’s official release at Aulani taking place on July 27, 2018.

‘Olu Mel also has a backstory, just as the other characters in the Duffy and Friends franchise also have a backstory. ‘Olu Mel’s backstory is reflected in the hang tag attached to ‘Olu Mel merchandise:



And as described on a Disney website¹⁶:

“‘Olu Mel is a turtle slightly shy and reserved but is truly passionate about and talented in music. Surrounded by the beautiful nature of Hawai’i, he learned how to hear and appreciate the music played by nature—birds, trees, winds and ocean waves. He also uses his ukulele to write songs about nature, adventure, and friendship, which have the power to bring courage and smiles to his friends, and to himself! Whenever ‘Olu Mel plays music, Duffy and his friends feel happy and closer to each other.’”

¹⁵ TWDC-OLU000276-291.

¹⁶ <https://sites.disney.com/waltdisneyimagineering/duffys-friends/>.

VI. OPINIONS

A. There Are No Protectable Similarities Between ‘Olu Mel and Honu

It is my opinion that any elements shared by ‘Olu Mel and Honu are not original to Plaintiffs and, in fact, represent elements that are a) stock expression that is common to the genre of children’s entertainment and media, b) elements that are found in nature, such as the coloration of or markings on real turtles, c) expression that flows from abstract ideas associated with the concept, and/or d) otherwise not original to the Plaintiffs. In my research, I found numerous prior works dating back more than 100 years that have reflected many of the same elements that Plaintiff claims are unique.

Below I will explain my opinions, first considering each allegedly similar element individually, and then in combination. I will also assess the differences in the depictions of each element, and additional differences between ‘Olu Mel and Honu.

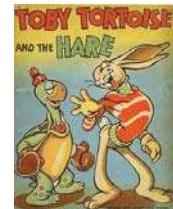
1. Any Physical Elements Shared By ‘Olu Mel and Honu Are Not Original

From my review of images of ‘Olu Mel and Honu, I have identified the following shared elements: they both (1) are anthropomorphized turtles, (2) with blue eyes, (3) that have green colored bodies with lighter bellies, and (4) spotting. None of the elements – whether alone, or in combination – are original to Plaintiffs. And each element is depicted *differently* between ‘Olu Mel and Honu.

a) Anthropomorphized Turtle

The history of children’s media is filled with anthropomorphized turtles, dating as far back as “The Tortoise and the Hare” from *Aesop’s Fables*, originally published in English translation in 1484.¹⁷ Indeed, anthropomorphized turtles appear in mythology across the world – from Japan to West Africa to Indigenous American cultures.

Disney, in particular, has featured anthropomorphized turtles in numerous works. Disney created one of the earliest examples, having produced a short animated film version of *The Tortoise and the Hare* as early as 1935,¹⁸ featuring Toby Tortoise, who walks on his hind legs and makes human-like facial expressions. Disney also released a picture book version of the story, *Toby Tortoise and the Hare* in 1938.¹⁹

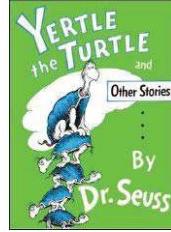
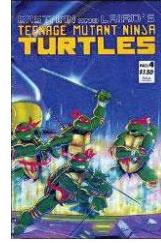


¹⁷ <https://www.victorianweb.org/genre/childlit/aesop.html>

¹⁸ <https://www.disneyplus.com/browse/entity-90930967-e241-4764-a8ef-adf484da9b28>; <https://www.imdb.com/title/tt0027126/>

¹⁹ Walt Disney Studios, *Toby Tortoise and the Hare* (1938); <https://www.abebooks.com/TOBY-TORTOISE-HARE-Walt-Disney-Studios/30748158427/bd>

Other widely-known anthropomorphized turtles that long pre-date Honu include:

Cecil Turtle <i>Tortoise Beats Hare</i> (1941) ²⁰	
Yertle the Turtle <i>Yertle the Turtle and Other Stories</i> (1958) ²¹	
<i>Teenage Mutant Ninja Turtles</i> (first appearance in 1984) ²²	
Franklin <i>Franklin the Turtle</i> (1997-2006) ²³	
Verne <i>Over the Hedge</i> (2006) ²⁴	

²⁰ <https://archive.org/details/tortoise-beats-hare-1941>

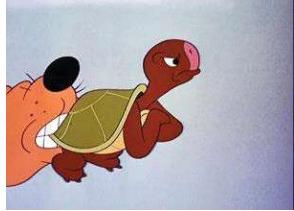
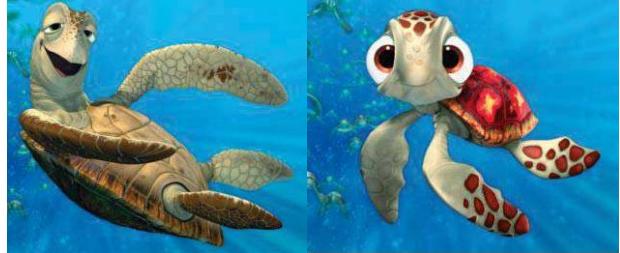
²¹ Dr. Suess, *Yertle the Turtle and Other Stories* (1958).

²² *Teenage Mutant Ninja Turtles* vol. 1, 4 (2nd printing) (May, 1987).

²³ <https://www.amazon.com/Franklin-Season-1/dp/B00BU8F7P4>; <https://www.imdb.com/title/tt0203254/>

²⁴ <https://www.netflix.com/title/70044882>

Disney itself has created numerous turtle characters since the early days of *The Tortoise and the Hare*, a non-exhaustive list of which is reflected in the chart below:

Unnamed Turtle <i>Pluto's Surprise Package</i> (1949) ²⁵	
Toby Turtle <i>Robin Hood</i> (1973) ²⁶	
Baby Shelby <i>Mickey Mouse Works "Donald's Shell Shots"</i> (1999 ²⁷)	
Crush and Squirt <i>Finding Nemo</i> (2003) ²⁸	

²⁵ <https://www.youtube.com/watch?v=LVUohp7ZHjw>

²⁶ <https://www.disneyplus.com/movies/robin-hood/5ACMz1bJJwwZ>

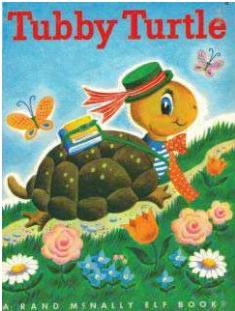
²⁷ https://www.youtube.com/watch?v=zAaYPk94464&list=PLltB2ZU9nchXbWh9C-2q9h2ShP_L-L4vg&index=12&t=67s

²⁸ <https://www.disneyplus.com/movies/finding-nemo/5Gpj2XqF7BV2>

The Troubadour <i>Mickey, Donald, Goofy: The Three Musketeers</i> (2004) ²⁹	
Shelbow <i>The Little Mermaid: Ariel's Beginning</i> (2008) ³⁰	

b) Bright Blue Eyes

Plaintiff identifies Honu's bright blue eyes as being a feature unique to Honu. In my research into existing turtle characters in children's media, I found several sea turtles that are depicted with bright blue eyes. These include the titular character, Sammy, from "A Turtle's Tale: Sammy's Adventures" (2010) and "A Turtle's Tale 2: Sammy's Escape from Paradise" (2012);³¹ Baby Honu from the 1997 children's book *Baby Honu's Incredible Journey*.³² I also found several animated land turtles from children's media depicted with blue eyes. Among them, Tuck from *Wonder Pets!* (2006), an animated musical television program, which aired on Nickelodeon from 2006-2011; *Myrtle the Blue Eyed Turtle* by Tisha Admire Duncan, a children's picture book published in 2012; *Tubby Turtle* a children's book first published by Rand McNally in 1959. Images of these many other blue-eyed turtles from various children's entertainment properties are included below:

<i>Tubby Turtle</i> (1959) ³³	
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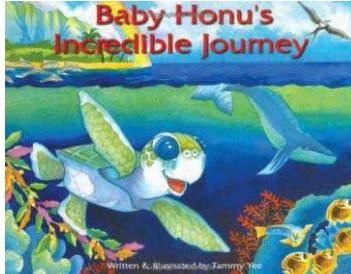
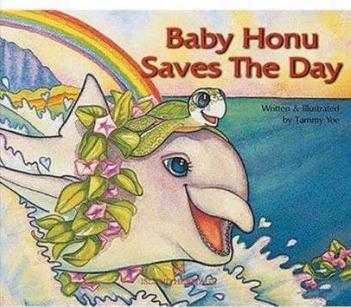
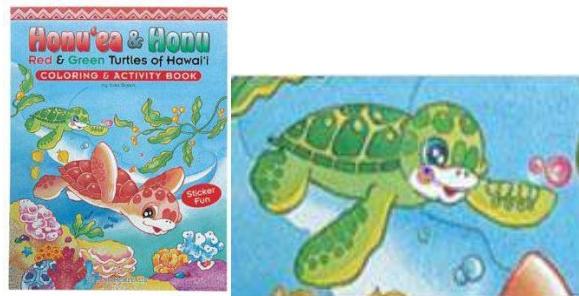
²⁹ <https://www.disneyplus.com/movies/mickey-donald-goofy-the-three-musketeers/63Rf2h1fwlIO>

³⁰ <https://www.disneyplus.com/movies/the-little-mermaid-ariels-beginning/bhyGppmki2LX>

³¹ <https://www.imdb.com/title/tt1230204/>; <https://www.imdb.com/title/tt2288005/>

³² <https://www.tammyyee.com/bbyhonu.html>

³³ Helen Wing and Helen Adler, *Tubby Turtle* (1959).

<p><i>Baby Honu's Incredible Journey</i> (1997)³⁴</p>	
<p><i>Baby Honu Saves The Day</i> (1999)³⁵</p>	
<p><i>Honu'ea & Honu: Red & Green Turtles of Hawai'i Coloring & Activity Book</i> (2002)³⁶</p>	
<p><i>Limu the Blue Turtle and His Hawaiian Garden</i> (2004)³⁷</p>	

³⁴ Tammy Yee, *Baby Honu's Incredible Journey* (1997).

³⁵ Tammy Yee, *Baby Honu Saves The Day* (1999).

³⁶ Yuko Green, *Honu'ea & Honu: Red & Green Turtles of Hawai'i Coloring & Activity Book*.

³⁷ Kimo Armitage and Scott Kaneshiro, *Limu the Blue Turtle and His Hawaiian Garden* (2004).

Tuck from <i>Wonder Pets!</i> (2006) ³⁸	A green sea turtle named Tuck, wearing a red Santa hat and a green hula skirt made of seaweed, standing on a beach.
Sammy from <i>A Turtle's Tale: Sammy's Adventures</i> (2010) ³⁹	Three turtles, including a large green one in the foreground and two smaller ones behind it, set against a blue underwater background.
<i>A Turtle's Tale 2: Sammy's Escape from Paradise</i> (2012) ⁴⁰	The movie poster for "A Turtle's Tale 2: Sammy's Escape from Paradise". It features three turtles (green, grey, and blue) swimming in an underwater environment with coral reefs and bubbles.
<i>Myrtle the Blue Eyed Turtle</i> (2012) ⁴¹	A cartoon illustration of a green sea turtle with large blue eyes and a yellow starfish on its head, walking on sand.

³⁸ https://www.paramountplus.com/shows/video/hTyb8EEbe2rd90RjZZ5en6Wo5kf_rtME/

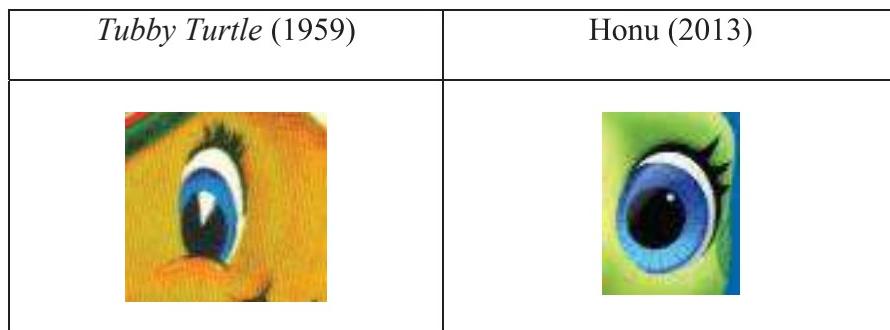
³⁹ https://www.amazon.com/gp/video/detail/amzn1.dv.gti.d6b29a01-897e-292b-fc59-c78cc484afb4?autoplay=0&ref_=atv_cf_strg_wb

⁴⁰ https://www.amazon.com/gp/video/detail/B07VBGQ28Y/ref=atv_dp_amz_c_TS8274d9_1_1?jic=16%7CCgNhbGwSA2Fsba%3D%3D

⁴¹ Tisha Admire Duncan, *Myrtle the Blue Eyed Turtle: A "My Direct Cat Mutt" Adventure* (2012)

Keiki Counting (2013) ⁴²	
Various Clip Art (2013)	 43 44

In my opinion, the design of Honu's eye appears to pull from the image of Tubby Turtle, dating back to 1959. In both, the turtles have large eyes, with large black pupils surrounded by a bright blue iris, showing the whites of eye, including a white coloration on the pupils, with prominent black eyelashes:



Beyond specific depictions of turtles, it should be noted that blue eyes are an extremely common choice for illustrated children's characters and toys, both human and animal. Going back to the early 20th century, blue was the most popular choice of eye color for baby dolls, representing the Eurocentric beauty standards of the time. In terms of anthropomorphized animals in cartoon or toy form, blue is also a popular choice. Disney has a history of designing animal characters with blue eyes, from some of their earliest color feature films, including Dumbo the elephant in *Dumbo* (1941), Faline in *Bambi* (1942), Donald Duck in *The Three Caballeros* (1944)⁴⁵ to more recent Disney-Pixar features like Flik from *A Bug's Life* (1998) and Pearl from *Finding Nemo* (2003).

⁴² Tammy Yee and Yuko Green, *Keiki Counting 1-2-3* (2013).

⁴³ <https://depositphotos.com/vector/cute-turtle-cartoon-37414499.html> (2013).

⁴⁴ <https://www.shutterstock.com/image-vector/cute-sea-turtle-cartoon-161439218> (2013).

⁴⁵ <https://www.imdb.com/title/tt0038166/mediaviewer/rm2827400193/>

c) Green Bodies and Lighter Shells Color

The yellow and green combination reflected in Honu is among the most common color schemes for rendering illustrated and animated turtles. In nature, many turtles, including sea turtles, have green and yellow coloring.⁴⁶ Indeed, Warner Brothers introduced Cecil Turtle, depicted above, in 1941, rendered in a green color with a yellow belly and brown shell. The popular children's animated television show *Franklin the Turtle*, which originally aired from 1997-2004, drew the titular turtle character with a green body, yellow belly, and brown shell. The *Teenage Mutant Ninja Turtles*, another of the most popular children's turtle characters, are also drawn with yellow bellies and green bodies. The convention may have been inspired by another well-known turtle species, the yellow-bellied slider turtle, native to the southeastern United States:



⁴⁷

That a cartoon turtle would be drawn using these colors is an unsurprising choice that flows from the actual appearance of this type of turtle as it exists in nature. Children's entertainment generally likes to draw from nature where possible, because nature provides familiar images and behaviors and enhances claims for an educational aspect to the book, video or film.

As noted below, 'Olu Mel's color scheme is more consistently green, with the belly being a lighter shade that is close to a yellow, but nowhere near as vibrant as the yellow depicted in Honu or other turtle characters.

d) Spotting on Hands and Feet

The spotting on Honu's hands and feet is also an element found in nature. Green sea turtles, the species that Honu is inspired by,⁴⁸ display a spotted pattern on their limbs, which is common knowledge that can be seen in nearly any image of such turtles:



⁴⁹



⁵⁰



⁵¹

⁴⁶ <https://www.fisheries.noaa.gov/species/green-turtle>

⁴⁷ <https://www.fws.gov/species/yellow-bellied-slider-trachemys-scripta-scripta>

⁴⁸ First Amended Complaint.

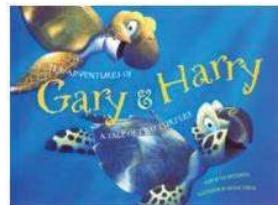
⁴⁹ <https://dtmag.com/thelibrary/an-interesting-dive-buddy-the-green-sea-turtle/>

⁵⁰ <https://www.nwf.org/Educational-Resources/Wildlife-Guide/Reptiles/Sea-Turtles/Green-Sea-Turtle>

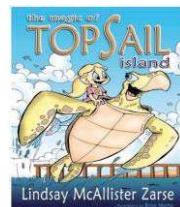
⁵¹ <https://kids.nationalgeographic.com/animals/reptiles/facts/green-sea-turtle>

An artistic rendering of this spotted effect is clearly an interpretation of the animals as they are found in nature.

This is also a feature seen in other artistic depictions of turtles for children's media. Sammy, the blue-eyed sea turtle from *A Turtle's Tale*, shows spotting on his limbs and head. The illustrated books *Baby Honu Saves the Day* and *Keiki Counting*⁵² by Tammy Yee—both of which also depict blue-eyed sea turtles—show spots on the turtle's limbs, in differing levels of abstraction, the former showing spots that look closer to scales, and the latter using simplified dots. Other children's book depicted similar spotting. *Honu'ea & Honu: Red & Green Turtles of Hawai'i Coloring and Activity Book*, published in 2002 and noted above, depicts a blue-eyed turtle (called Honu) with a green coloration and spotting on its limbs. *The Adventures of Gary & Harry: A Tale of Two Turtles* (2006)⁵³ – which was illustrated by Michael Furuya, who I understand also designed Honu – depicts notable spotting on two sea turtle characters:



The Magic of Topsail Island,⁵⁴ published in 2010, uses a similar spotting effect in its depiction of a blue-eyed sea turtle:



Simplified spots that are fewer in number and more closely resemble freckles like those on 'Olu Mel, are seen on Disney's Shelbow from *The Little Mermaid: Ariel's Beginning* (2008).⁵⁵



⁵² Tammy Yee and Yuko Green, *Keiki Counting 1-2-3* (2013).

⁵³ Lisa Matsumoto and Michael Furuya, *The Adventures of Gary & Harry: A Tale of Two Turtles* (2006).

⁵⁴ Lindsay McAllister Zarse and Brian Martin, *The Magic of Topsail Island* (2010).

⁵⁵ <https://www.disneyplus.com/movies/the-little-mermaid-ariels-beginning/bhyGppmki2LX>

Nor is spotting on depictions of anthropomorphized turtles limited to sea turtles. Disney's Toby the Tortoise, depicted above, has spotting on his arms and legs, as does Tank, a turtle character in the animated series *My Little Pony Friendship is Magic*.⁵⁶



2. The Addition Of A Ukulele To A Character Associated With Hawaii Is Unoriginal

As noted in my introduction to this report, I believe it is important for any proper analysis of allegedly similar elements to distinguish between the standard Honu, created in 2013, and Ukulele Honu, created in 2016 and published in 2018. The only notable difference between the standard Honu and Ukulele Honu is that Honu is depicted holding a ukulele. The addition of a ukulele to an animated character associated with Hawaii is in no way original. Rather, ukuleles appear often in children's cartoons and are also a generic trope associated with Hawaiian culture.

The obviousness of this point can be gleaned from Disney's history of depicting characters in Hawaii with ukuleles. As far back as 1937, Mickey Mouse and Donald Duck appeared in Disney's short film *Hawaiian Holiday* playing ukuleles.⁵⁷ More recently, Stitch from *Lilo & Stitch* (2002) plays Elvis's "Devil in Disguise" on the ukulele in the film, which takes place in Hawaii.⁵⁸ A Disney Animated Short from 2016 – which I understand that Mr. Enos worked on – features characters in Hawaii, with Minnie Mouse playing the ukulele.⁵⁹ Visual depictions of these Disney characters are reflected below:

⁵⁶ https://www.imdb.com/title/tt2071867/?ref_=ttep_ep7; <https://www.netflix.com/watch/70235599?trackId=255824129&tctx=0%2C0%2C735f6ffb-4b54-44f9-b5c6-e4034e3e434c-169699791%2C735f6ffb-4b54-44f9-b5c6-e4034e3e434c-169699791%7C2%2Cunknown%2C%2CtitlesResults%2C70234440%2CVideo%3A70235599%2CdetailsPageEpisodePlayButton>

⁵⁷ <https://www.disneyplus.com/play/06955cc6-9665-4faf-9ca7-cc2419be25d3>

⁵⁸ <https://www.disneyplus.com/browse/entity-e291d4ea-cd86-4eb2-9f39-20d2b75165ee>

⁵⁹ <https://www.youtube.com/watch?v=QDhdMF0qZI8>

<i>Hawaiian Holiday</i> (1937)	
<i>Lilo & Stitch</i> (2002)	
<i>Ku'u Lei Melody</i> (2016)	

Another early example of a anthropomorphized animal character being depicted playing a ukulele is the *Looney Tunes* animated short from 1953, featuring Daffy Duck.⁶⁰ And, the wildly popular Nickelodeon show, *SpongeBob SquarePants*, which has been running since 1999, depicts the titular character playing a ukulele, and also sells *SpongeBob* branded merchandise.⁶¹



There is even an example from 2006 of musical and turtle-like characters (or rather, peas dressed as turtles) playing ukuleles, including a green turtle with spotting and a yellow belly, as reflected in the video *Lance the Turtle* from *VeggieTales*⁶²:

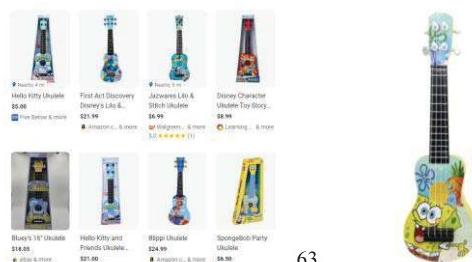
⁶⁰ <https://www.youtube.com/watch?v=6XvXsuSJ-1A>

⁶¹ <https://www.youtube.com/watch?v=vS-0ncJ94YA>

⁶² <https://www.youtube.com/watch?v=ttRUTsZr81s>



As evidenced by the examples below, ukuleles are a popular instrument that can be marketed to children associated with their favorite brands and characters (Mickey Mouse, SpongeBob, Hello Kitty, Stitch, etc.) because of its small size, ability to be manufactured inexpensively, and its relative ease of use. While more costly models are made for serious musicians, the toy versions make an accessible entry-level string instrument for children.



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The use of a ukulele also flows naturally from Hawaii as a setting. It is common knowledge that the ukulele is associated with Hawaii in popular culture.⁶⁵ That a musical character located in Hawaii would play the ukulele flows naturally from the concept of a story set in Hawaii.

3. The Shared Physical Elements Are Depicted Differently In ‘Olu Mel And Honu

Plaintiffs' complaint alleges that Honu's appearance is "unlike any other anthropomorphized turtle characters."⁶⁶ In the previous section, I discussed numerous anthropomorphized turtle characters throughout the history of children's media which share similarities with Honu, including blue eyes and a "jade green color."

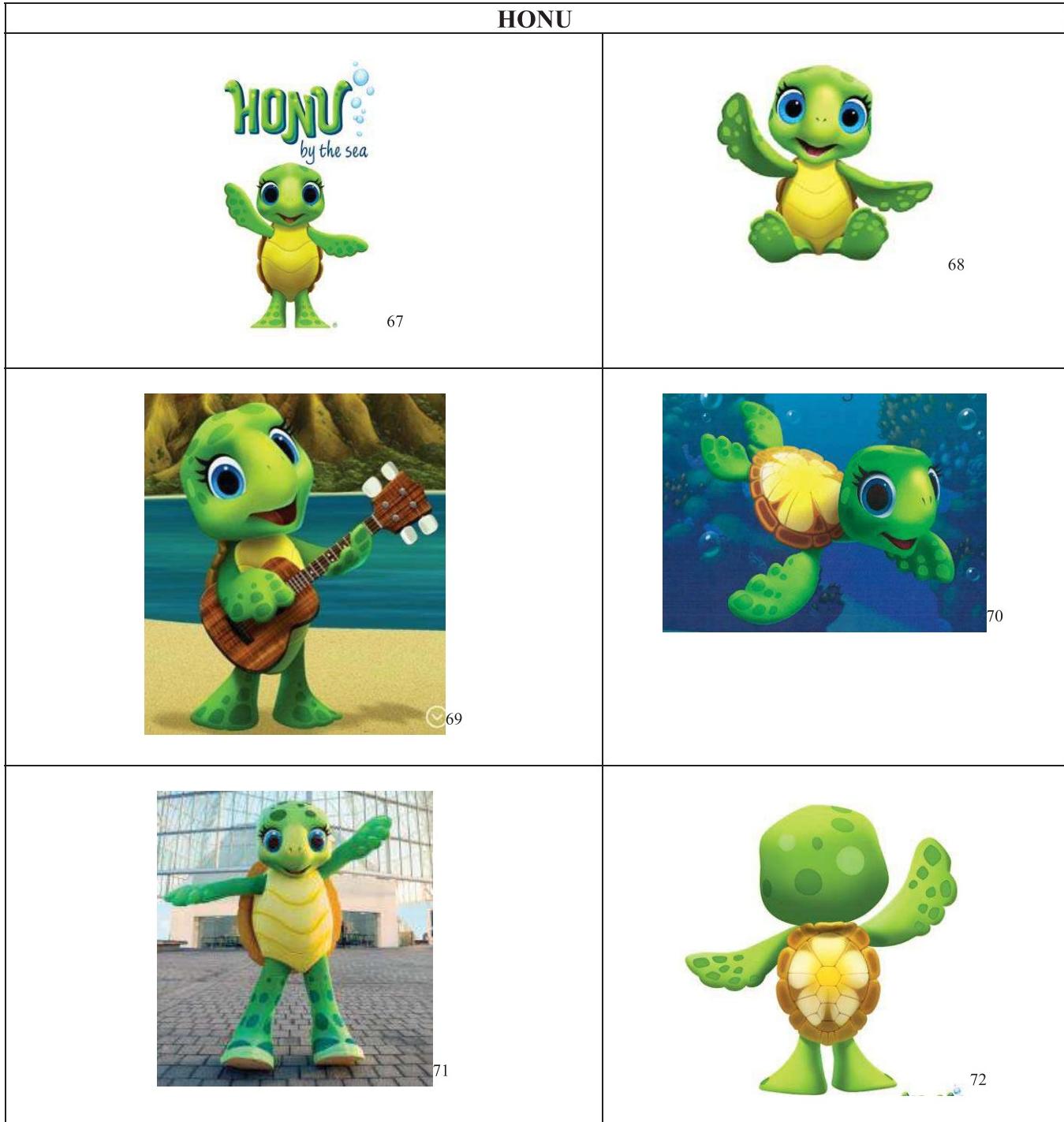
In terms of the specific artistic expression of the generic physical characteristics, I observe important differences between Honu and ‘Olu Mel. Images of each are reflected below for comparison purposes, and a discussion of the particularly noticeable differences follows. It is notable that there appear to be far more varied depictions of ‘Olu Mel than there are depictions of Honu:

⁶³https://www.google.com/search?q=children%27s+characters+ukulele&oq=children%27s+ch&gs_lcp=EgZjaHJvbWUqbBgAEAMYJzIGCAAQIxgnMgYIARAjGCcyBggCEEUYOTINCAMQAbIDARixAxiABDIHCAQQLhiABDIKCAUQABixAxiABDIHCAYQAbiABDIQCAcQAbiDARixAxiABBiKBTINCAgQAbiDARixAxiABDIHCAkQAbiABKgCCLACAQ&sourceid=chrome&ie=UTF-8 (last accessed November 21, 2024)

⁶⁴ <https://www.walmart.com/ip/Nickelodeon-SpongeBob-SquarePants-Ukulele/5478336983?wmlspartner=wlp&selectedSellerId=101048873>

⁶⁵ <https://luau.org/the-history-of-the-ukulele/>

⁶⁶ First Amended Complaint



⁶⁷ PL00005

⁶⁸ PL00231

⁶⁹ www.honubythesea.com (last accessed November 22, 2024).

⁷⁰ PL00494

⁷¹ PL00222

⁷² PL00014

‘OLU MEL



⁷³ <https://sites.disney.com/waltdisneyimagineering/duffys-friends/>

⁷⁴ <https://sites.disney.com/waltdisneyimagineering/duffys-friends/>

⁷⁵ TWDC-OLU000934.

⁷⁶ TWDC-OLU000898.

⁷⁷ <https://www.disneystore.com/olu-mel-plush-medium-15-400020586896.html>

⁷⁸ TWDC-OLU000912.

⁷⁹ <https://disneyparksblog.com/aulani/meet-music-loving-olu-mel-at-aulani-a-disney-resort-spa/>

⁸⁰ <https://d23.com/5-things-to-know-about-duffys-new-friends-and-yours-olu-and-cookie/>

a) Animation Style

Honu is typically rendered in a 3D CGI animation style that resembles the visual style first unveiled in Pixar's *Toy Story*, which has now become a ubiquitous and much-imitated style of animation for children's media. This style is also seen in the previously discussed example of *A Turtle's Tale: Sammy's Adventures*. By contrast, in illustrated form, 'Olu Mel is drawn in a more traditional 2D cartoon style.

b) Color

Honu employs a vivid, saturated color palette, while 'Olu Mel uses a lighter, desaturated palette of pale hues. Honu is described by the Plaintiff as having a "jade green color." Jade is generally accepted to be a cool-toned green with high saturation.⁸¹ By contrast, the majority of 'Olu Mel's body is a much paler, pastel shade of light green.

The outer rim of 'Olu Mel's shell is a brighter, more saturated teal color, and in the inner portion of the shell is green, in the same shade as 'Olu Mel's body. Honu's shell, however, is dark brown, with a yellow flower pattern.

The shade of yellow of Honu's belly is more saturated and bright, in line with the richer green color of his body. 'Olu Mel's belly, however, is much lighter color, appearing more as a pale shade of yellow-green lime color, rather than a distinct yellow. The design of the bellies also differs—'Olu Mel has two straight, horizontal stripes, with one vertical stripe down the middle, whereas Honu has three rounded horizontal stripes.

The shade of blue in each character's eyes is also different. 'Olu Mel's is more desaturated in line with the overall color palette, as opposed to the deeper blue of Honu's eyes.

c) Dimensions and Shapes

Eyes: Honu's eyes are Honu's most prominent facial feature, taking up nearly a third of Honu's entire face. They are round and wide-set with large black pupils, and are surrounded by the white of Honu's eyes.

Unlike other turtle characters, 'Olu Mel's eyes are small and button-like, *i.e.*, close together, with small pupils and irises that sit just above his nose, with no white showing, and are surrounded by large, oblong patches of lime coloring which, together with his nose, form a classic Mickey Mouse silhouette and profile. I understand this is a consistent feature throughout the Duffy and Friends franchise:



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⁸¹ <https://www.figma.com/colors/jade-green/>

⁸² <https://sites.disney.com/waltdisneyimagineering/duffy-the-disney-bear/>

Honu also has three prominent thick eyelashes on each eye, while ‘Olu Mel, being flatter and less photorealistic in animation style, has no eyelashes.

Nose: ‘Olu Mel’s nose is circular and distinct from the rest of the face as it is lighter in color and cleanly defined, giving a button nose effect. It also reflects the distinctive shape of Mickey Mouse’s head, consistent with other Duffy and Friends characters. Honu, on the other hand, has two small slits for nostrils, but otherwise, in keeping with the Pixar-style 3D CGI animation style, Honu’s nose is not particularly defined, instead smoothly shaded to give the illusion of depth.

Limbs: Honu’s fins are more similar to sea turtle fins, appearing in a paddle-like blade shape with a scalloped edge like those found in nature. ‘Olu Mel’s design sticks with the more abstracted style of drawing with the limbs of a land turtle, including four individual darker green claws or nails on each limb that evoke human fingers and toes. ‘Olu Mel also has circular pads on his hands; Honu has nothing similar.

Freckles/Spotting: Honu has prominent spotting on his fins and head, in a regular and repeating pattern. ‘Olu Mel, however, has limited spotting, scattered in a random pattern across his limbs. The spotting is barely visible in some iterations, such as the walk around character. The spotting on ‘Olu Mel’s leg is in the distinctive shape of Mickey Mouse’s head. ‘Olu Mel also has freckles on his face, whereas Honu does not.

Shell Design: The back of Honu’s shell is colored in brown and yellow, and reflects a simplistic flower pattern. The back of ‘Olu Mel’s shell is in shades of green and teal, and depicts yet another Mickey Mouse silhouette, as well as the distinctive arch associated with Aulani.

Clothing: ‘Olu Mel is often depicted wearing clothing. To my knowledge, Honu is never depicted in a full outfit.

Ukulele: Initially, many depictions of ‘Olu Mel, and most depictions of Honu, do not contain a ukulele at all. But when they do, ‘Olu Mel’s ukulele is light brown in color, and is typically adorned with stickers depicting a flower and the Aulani logo. Honu’s ukulele, at least as depicted in the version posted by Plaintiffs in July 2018 and currently visible on Plaintiffs’ website,⁸³ has no adornments, and is depicted in a dark brown color with a more realistic wood grain effect.

4. ‘Olu Mel and Honu Do Not Share Any Original Conceptual Similarities

As noted in the background section of this report, it is difficult to properly assess any conceptual or personality traits of Honu, since Honu exists only in a small variety of images, and as a mascot. Honu is not a character in any broader story, and I am not aware of any written description of any traits associated with Honu, other than Plaintiffs’ complaint. However, even taking Plaintiffs’ allegations as true, there are no original conceptual personality traits shared by Honu and ‘Olu Mel. Rather, the traits of the two differ in most respects.

As described above, it is my opinion that the allegedly substantially similar elements shared by Plaintiffs’ Honu and Defendants’ ‘Olu Mel are all either a) stock expression found across the genre of

⁸³ <http://www.honubythesea.com/> (last accessed November 21, 2024).

children's entertainment, b) artistic renderings of features present in turtles in nature, c) expression that flows naturally from their respective concepts, or d) elements that are not original to the Plaintiffs.

However, it is also my opinion that 'Olu Mel contains some unique artistic expression of these concepts and qualities that make it identifiably distinct from Honu and *Honu by the Sea*. I believe that these qualities and differences are visible and describable, and I will elaborate on them below.

a) Notable Conceptual Differences

First, I will examine the conceptual differences between Honu and 'Olu Mel and the associated plots or backstories.

(I) Plot and Themes.

I have reviewed a number of the scripts submitted by Plaintiffs, including Plaintiffs' copyrighted version. All of the scripts I reviewed share a message of environmentalism and ocean conservation. As noted above, Honu is not a character in any of these scripts. Rather, Honu is, at most, a stand-alone mascot in some performances, added on for "meet and greet" sessions with the audience but not integrated into the show or story.

In *Honu by the Sea: A New Musical* (PA 1-826-606),⁸⁴ the main character, a human boy named Kainoa, is granted his wish to spend one day under the sea. This chance for a human boy to spend a day under the sea is the inciting incident the script relies on. Upon arrival, he meets a cast of characters who emphasize lessons about ocean conservation in various ways. The song "Common Sense" instructs listeners to utilize their common sense by picking up trash found on the ground (or in the sea). Kainoa's dramatic action comes in the form of a rescue mission to save the mother of the primary turtle character, Malia, from being trapped by a fisherman's net and other debris like plastic bags. After the rescue, Kainoa returns to his life on land, prepared to share what he has learned with his human friends about the importance of picking up trash and protecting the ocean.

"IMAGINE 2020 - Honu by the Sea J20"⁸⁵ features Kainoa spending a magical day underwater and involves the rescue of a seahorse (Kapper) who is stuck in a plastic bag, and the "Common Sense" song. It also features the "Ocean Cleanup Song" and ends with Kainoa returning to spread the message of how to be a "guardian of the sea."

"Honu Rainbow of Colors Kahala Hotel Show (Working Script December 2, 2023 update)"⁸⁶ is not a narrative, but a collection of songs and a lesson on how to say the colors of the rainbow in Hawaiian. This show also features a version of the "Common Sense" song, and the "Imagine" song which invites the listener to imagine a world where all creatures can share the earth and be "free."

⁸⁴ PL00486.

⁸⁵ PL00484.

⁸⁶ PL00485.

“Honu by the Sea (Hawaii Theatre Version) Full Show”⁸⁷ introduces a villain character called Slicker who “is powerful because he was created from all the neglect of the people who stopped caring” about the ocean.⁸⁸

As the press release for the *Honu by the Sea* show at Japan’s Tokyo Sea Life Park in 2017⁸⁹ says, “The Broadway-style musical provides lessons on the value of friendship and the virtues of saving the ocean environment through the magic of theater.”⁹⁰ The later “Honu Mele” show that Mr. Enos described in his deposition also has “all themes to do with ocean and imagination.”⁹¹ All iterations of the *Honu by the Sea* show that I examined shared the environmental theme.

By contrast, ‘Olu Mel exists within the Duffy and Friends universe, has a more developed storyline and character traits, and, as a whole, reflects an original character with discernable features and character traits. Disney describes the origins of Duffy: “when Mickey Mouse the sailor, based in Cape Cod, was leaving on a long sea voyage, Minnie Mouse made Duffy to keep Mickey company during his travels. Minnie presented her hand-sewn bear to Mickey in a duffel bag, which is how Mickey came up with the name Duffy.”⁹² The branding of Duffy emphasizes a return to innocence and nostalgia: “With a willingness to do anything to bring a smile to his friends, and his quintessential innocence, Duffy takes all of us back to our childhood when we all had an ‘inner Duffy.’”⁹³

According to the Disney Parks Blog, Mickey and Duffy discovered ‘Olu Mel while they were sailing together in search of a present for Duffy’s girlfriend, ShellieMay. They heard the sounds of a ukulele and found “a kindhearted turtle playing happy music.” They invited ‘Olu with them to play the song for ShellieMay’s birthday party and became friends.⁹⁴

While ‘Olu Mel takes inspiration for his music from the sounds of nature,⁹⁵ conservation and environmental messaging play no part in ‘Olu Mel’s story. Rather, each of Duffy’s friends partake in a different art – Gelatoni the cat paints, StellaLou the rabbit is a dancer, CookieAnn the dog loves to cook, and ‘Olu Mel loves music.⁹⁶

Though Plaintiffs’ Honu appears with a ukulele in certain artwork, he does not appear as a character in any of the musical scripts. Instead, the turtle that appears in the scripts is a female named Malia, whose purpose in the story is to introduce the human character to various sea animals, and to initiate the rescue of her mother from environmental threats. The turtle in the script is never specified to be using a ukulele

⁸⁷ Transcript of Deposition of John William Kaipo Enos dated August 22, 2024, Ex. 28

⁸⁸ *Id.*, at pg. 36.

⁸⁹ PL00141-001.

⁹⁰ *Ibid.*

⁹¹ Transcript of Deposition of John William Kaipo Enos dated August 22, 2024, at 364:3-4.

⁹² <https://sites.disney.com/waltdisneyimagineering/duffy-the-disney-bear/#:~:text=Duffy's%20Story,-Imagineers%20first%20created&text=when%20Mickey%20Mouse%20the%20sailor,up%20with%20the%20name%20Duffy>

⁹³ *Ibid.*

⁹⁴ <https://www.wdwinfo.com/aulani/the-story-of-'olu-a-new-friend-at-the-aulani-resort/>

⁹⁵ <https://sites.disney.com/waltdisneyimagineering/duffys-friends/>

⁹⁶ *Ibid.*

or any other instrument, whereas ‘Olu Mel’s music is his primary characteristic and his entrance into the story world of the Duffy and Friends universe.

(2) *Character and Personality*

According to the Disney Parks Blog, ‘Olu Mel is “known to be a bit shy, [but] is happiest making others smile with his music.”⁹⁷ ‘Olu Mel’s musical ability is presented as central to his character, relies upon his existence on land, rather than in the sea, and goes along with his slightly timid personality.

As addressed in the previous section, the Complaint describes Honu’s personality and talents as “specific and unique in expressing joy and musical talent,”⁹⁸ but does not further elaborate in any way on how either joy or musical talent are unique. A joyful, upbeat personality is a fundamental feature of nearly all children’s entertainment in order to engage children’s attention and promote prosocial values. Further, the turtle character which appears in the Plaintiffs’ musical scripts, Malia, does not play an instrument, nor express a love for music.

b) Any Conceptual Similarities Are Generic and Unoriginal

(1) *Character’s Joyful and Uplifting Personality*

Characters throughout children’s literature are happy and upbeat with a desire to please. Honu’s description consists of mere “everyday” traits. His characteristics are typical where the audience is young children. They are not unique or original. They represent the goal of imparting and encouraging prosocial values in children.

(2) *Love of music*

Music is a core feature of children’s entertainment, as seen in early nursery rhymes. The use of music elicits children’s engagement, pleasure, and participation in what they are watching, and enhances memory.⁹⁹

The use of music flows naturally from the genre, and moreover, creating characters that sing and play instruments is a natural way to integrate music seamlessly into the narrative. Even Disney’s first sync-sound animated film, *Steamboat Willie* (1928) finds Mickey Mouse using all manner of objects and animals as improvised musical instruments – from strumming on a washboard, to drumming on pots and pans, to pulling the tails of suckling piglets, to using the teeth of a bull as a xylophone — in order to connect with and impress Minnie Mouse, who has lost her guitar to a hungry goat.¹⁰⁰ *Tom and Jerry* frequently play the guitar, *Peanuts’* Schroeder loves the piano, *The Muppets’* features the rock and roll band Dr. Teeth and the Electric Mayhem, the three anthropomorphic chipmunks sing and play music in *Alvin and the Chipmunks* (1958) – to name just a few of the most iconic children’s characters to play music.

⁹⁷ <https://disneyparksblog.com/aulani/meet-music-loving-'Olu-mel-at-aulani-a-disney-resort-spa/>

⁹⁸ First Amended Complaint.

⁹⁹ Kouri, Theresa, and Karen Telander. “Children’s Reading Comprehension and Narrative Recall in Sung and Spoken Story Contexts.” *Child language teaching and therapy* 24, no. 3 (2008): 329–349.

¹⁰⁰ <https://www.youtube.com/watch?v=BBgghnQF6E4>

Music plays an essential part in children’s entertainment, and portraying characters who love and play music themselves not only integrates music into the narrative but encourages children’s interest in playing music themselves – providing both educational and merchandising opportunities.

(3) *Friendship*

Characters who value the importance of friendship are a fundamental feature of the children’s entertainment genre and one of its most enduring themes. Children’s media often aims to combine entertainment with education — including imparting prosocial values and social-emotional skills, like sharing and caring, to young audiences.

In *Media Exposure During Infancy and Early Childhood*, Linebarger, Brey, Fenstermacher and Barr write, “Though television may not always provide direct opportunities for social engagement, it can facilitate the experience of positive social interactions through modeling of such behaviors. Learning from television may involve imitation, whereby young children copy behaviors that they have seen modeled by another person or character.”¹⁰¹

(4) *Association with Hawaii and Hawaiian Culture*

As noted above, Disney has a long history of identifying characters with Hawaiian culture, including through the incorporation of a ukulele. ‘Olu Mel, a character designed for the Aulani Resort in Hawaii, only follows this pre-existing trend. It is also readily apparent from the above referenced examples and discussion that Hawaiian writers and artists have an extensive history of creating turtle characters, including other blue-eyed sea turtles called “Honu.”

B. The Purportedly Shared Combination Of Unprotectable Elements Is Unoriginal

Above I have discussed my opinion that the allegedly similar elements in and of themselves are not unique, and rather, common to and widely represented in the genre, as well as how elements identified in the complaint are found in nature, expression that flows naturally from the concept, or otherwise not original to the Plaintiff. As is demonstrated in my discussion below, it is also my opinion that the combination of particular elements that is allegedly shared between Honu and ‘Olu Mel is not unique to Honu, and thus not protectable.

I also want to reiterate that, as noted above, even the actual depiction of the combination of allegedly shared elements is noticeably different between ‘Olu Mel and Honu. Among other things, ‘Olu Mel has the limbs of a land turtle, whereas Honu has the fins of a sea turtle. ‘Olu Mel’s face depicts three large lime colored circles in the shape of Mickey Mouse’s head, whereas Honu has nothing similar. ‘Olu Mel’s shell is green and teal, and depicts a Mickey silhouette surrounded by Aulani’s arches, whereas Honu’s shell is brown and yellow, with an image of a flower.

¹⁰¹ Linebarger, D.N., Brey, E., Fenstermacher, S., Barr, R. (2017). What Makes Preschool Educational Television Educational? A Content Analysis of Literacy, Language-Promoting, and Prosocial Preschool Programming. In: Barr, R., Linebarger, D. (eds) *Media Exposure During Infancy and Early Childhood*. Springer, Cham. https://doi-org.libproxy2.usc.edu/10.1007/978-3-319-45102-2_7

I would like to elaborate further on a few of the most salient examples from this list and their combinations of relevant elements.

1. A Turtle's Tale: Sammy's Adventures (2010)¹⁰² and A Turtle's Tale 2: Sammy's Escape from Paradise (2012)¹⁰³

Sammy is an **anthropomorphized sea turtle** with **blue eyes**, green coloring with yellow accents, **spots on his body**, including spots on his limbs that resemble those on turtles in nature, rendered in a **3D CGI animation** in the Pixar style. His story promotes **environmental themes** as Sammy witnesses the effects of climate change on the planet, and he has an **upbeat, positive personality**. His character arc is partially driven by the development of his **friendship** with his counterpart Shelly, while he takes an adventurous journey.¹⁰⁴ In *Turtle's Tale 2*, the hatchling Ella appears in a **vivid green color with yellow accents** on her belly and face.



¹⁰² <https://www.imdb.com/title/tt1230204/>

¹⁰³ <https://www.imdb.com/title/tt2288005/>

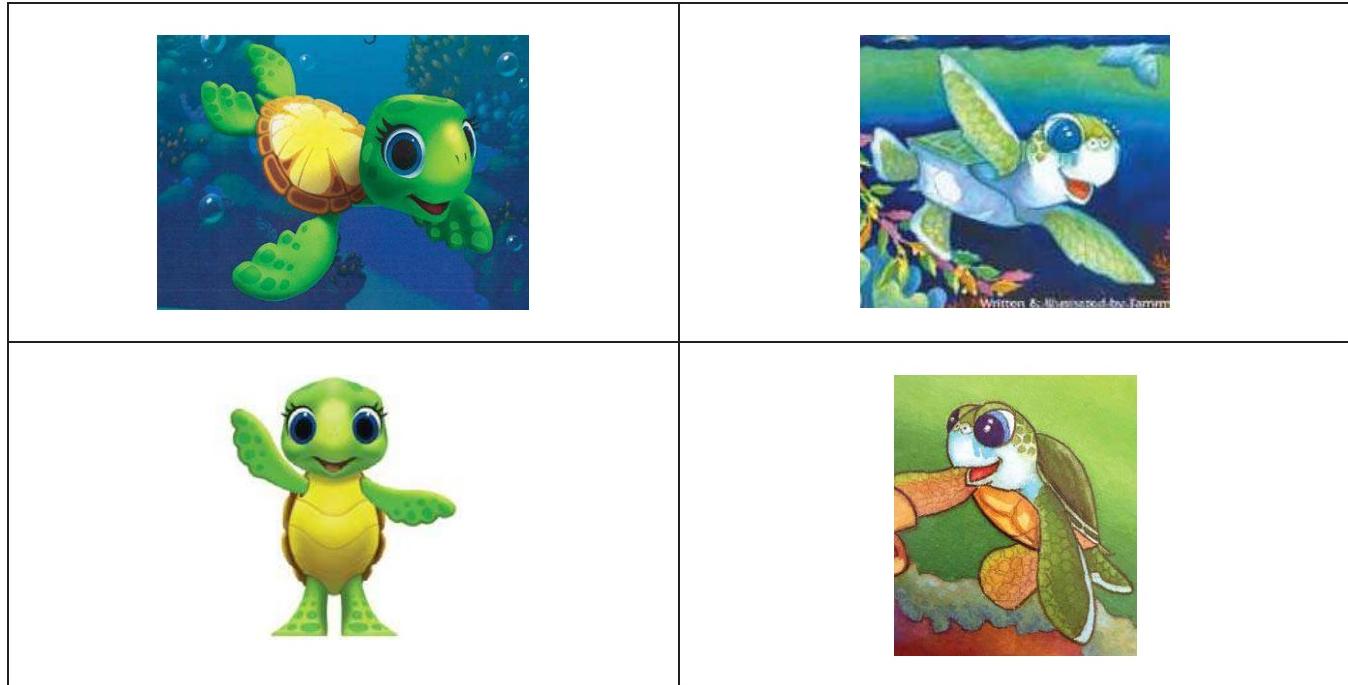
¹⁰⁴ <https://www.youtube.com/watch?app=desktop&v=HJ0SH49DOpE>

¹⁰⁵ https://www.imdb.com/title/tt1230204/mediaviewer/rm3714122496/?ref_=tt_ov_i

¹⁰⁶ https://www.imdb.com/title/tt2288005/mediaviewer/rm2958742016/?ref_=ttmi_mi_all_2

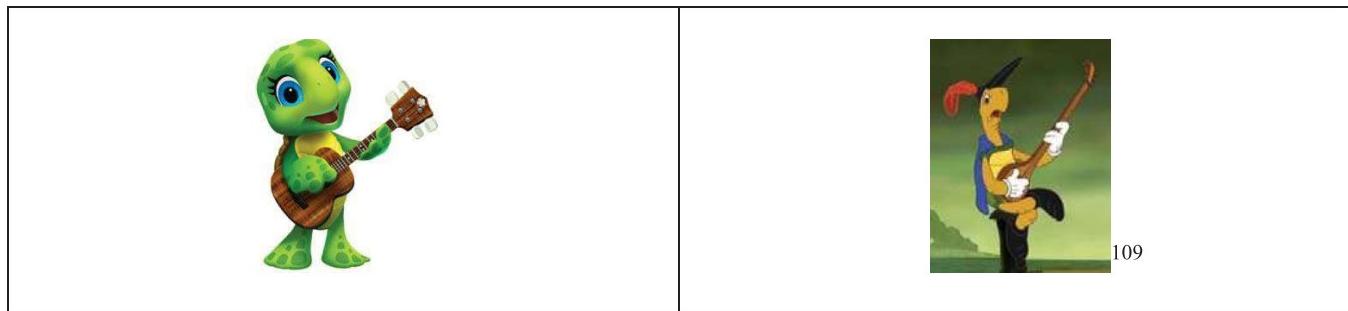
2. Baby Honu's Incredible Journey by Tammy Yee (1997), Baby Honu Saves the Day (1999)

In *Baby Honu's Incredible Journey*, which the Plaintiff testified that he was familiar with,¹⁰⁷ the sea turtle is **called Honu**, appears with **blue eyes** and **spots** on its body and limbs. The stories are set in **Hawaii**. In *Baby Honu Saves the Day*, Baby Honu has a **yellow belly** and enlists his friends' help to engage in a **rescue mission** of a young dolphin trapped on land.



3. The Troubadour from Mickey, Donald, Goofy: The Three Musketeers (Disney, 2004)¹⁰⁸

In this Disney film, the Troubadour is an anthropomorphized turtle, with a **yellow belly**, who narrates the action and **sings and plays a stringed instrument (the mandolin)**.



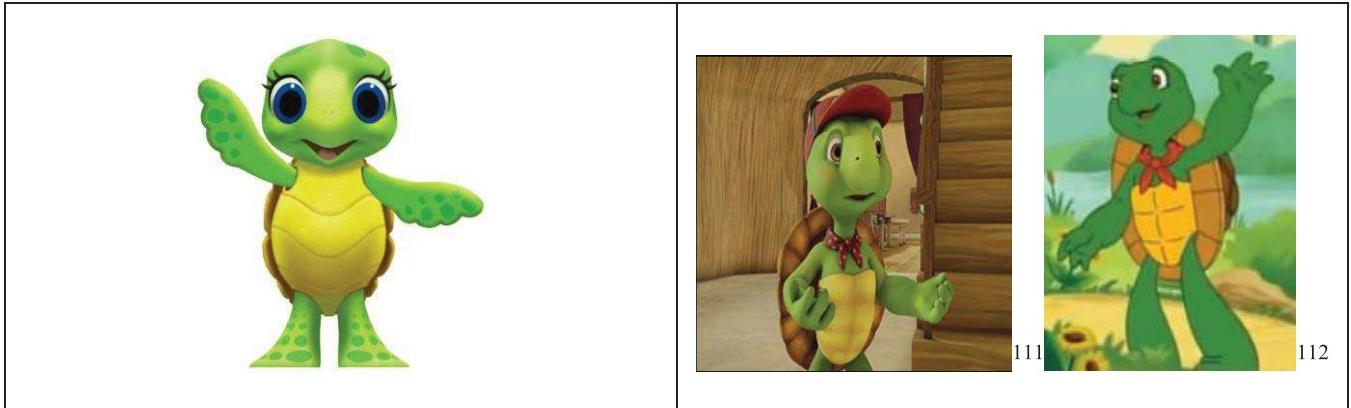
¹⁰⁷ Transcript of Deposition of John William Kaipo Enos dated August 21, 2024, at 150:23-153:6.

¹⁰⁸ <https://www.imdb.com/title/tt0371823/>

¹⁰⁹ <https://www.disneyplus.com/movies/mickey-donald-goofy-the-three-musketeers/63Rf2h1fwI0>

4. Franklin (1997-2006)/Franklin and Friends (Nickelodeon, 2011-2016)

Franklin is an **anthropomorphized turtle** with a **green body** and **yellow belly**, large eyes and a wide, sloping nose like Honu's. Franklin has two best friends, Bear and Snail. Many of the plots of *Franklin* and *Franklin and Friends* episodes deal with **friendship** and associated lessons on how to be a good friend.¹¹⁰ *Franklin* has spawned picture books, stuffed animals, and other merchandise. The follow-up series, *Franklin and Friends*, used a **3D CGI animation style** as well.



5. Stewie - Mascot of the US Navy Stewards of the Sea program

Stewie is an **anthropomorphized green sea turtle**. He serves as the mascot for the US Navy's "Stewards of the Sea: Defending Freedom, Protecting the Environment" outreach program, established in 2013.¹¹³ The program brings interactive exhibits and educational experiences across the country, **promoting responsible environmental stewardship**. Stewie helps deliver anti-littering and pro-recycling messages to children in an **upbeat, friendly tone**.¹¹⁴ He has **blue eyes**, a **green body**, and **yellow belly with spots on his limbs**. He exists in **animated form**, as a **walkaround character**, and as a **stuffed animal**.

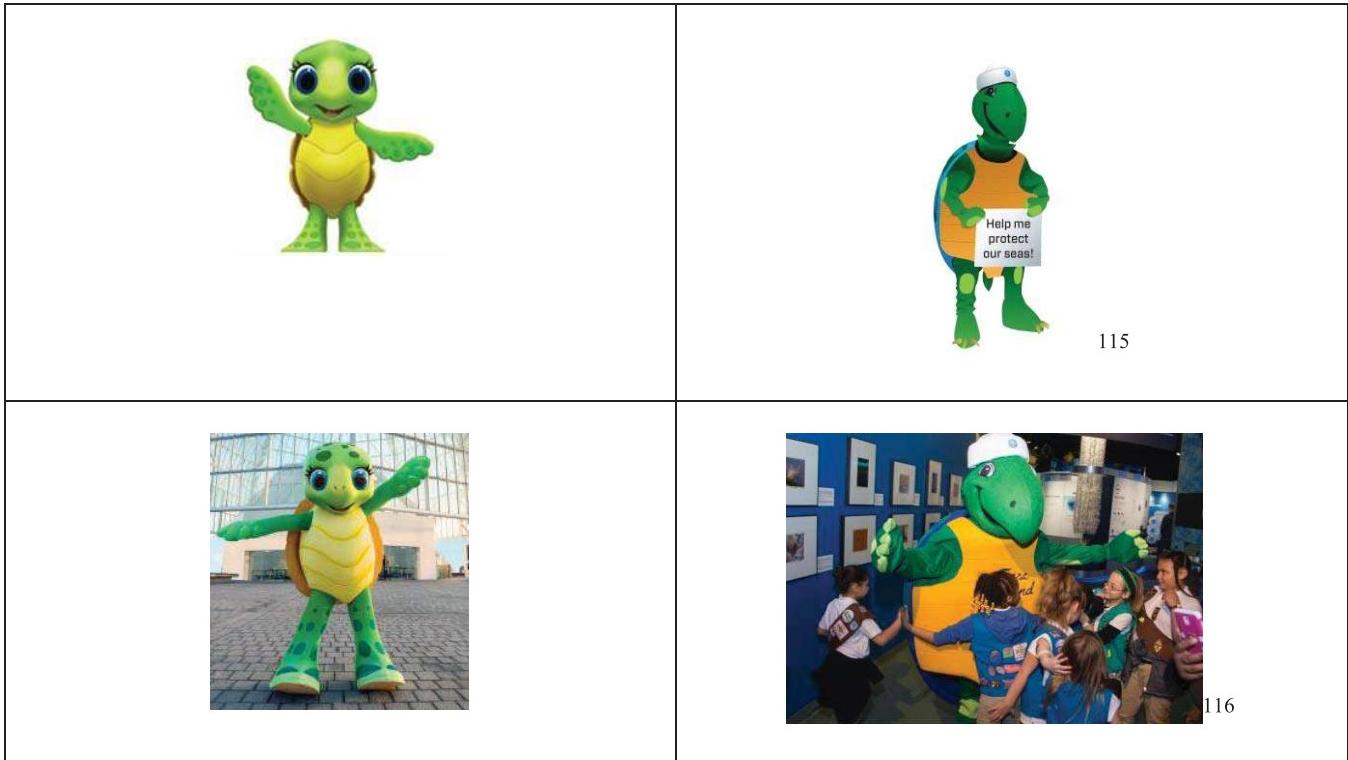
¹¹⁰ <https://canonplus.com/tabs/discover/videos/34269>; <https://canonplus.com/tabs/discover/videos/34794>; <https://canonplus.com/tabs/discover/videos/34796>

¹¹¹ https://www.imdb.com/title/tt2125149/mediaviewer/rm4184400896/?ref_=ttmi_mi_all_6

¹¹² https://franklin.fandom.com/wiki/Franklin_Turtle?file=Franklin_Character_Profile.jpeg

¹¹³ <https://www.usff.navy.mil/Community-Outreach/US-Navy-Stewards-of-the-Sea/Meet-Stewie/>

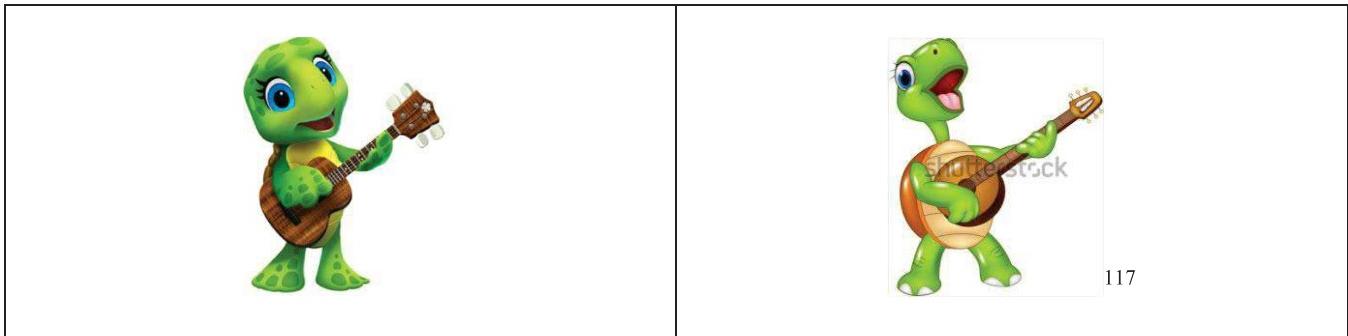
¹¹⁴ <https://www.youtube.com/watch?v=5fGWTk001UQ>



6. Clip Art

Even going beyond typical children's media, it is notable that extremely similar combinations of unoriginal elements can be found in clip art that is freely available for licensing. I believe the fact that similar traits can be found in clip art only underscores their generic nature.

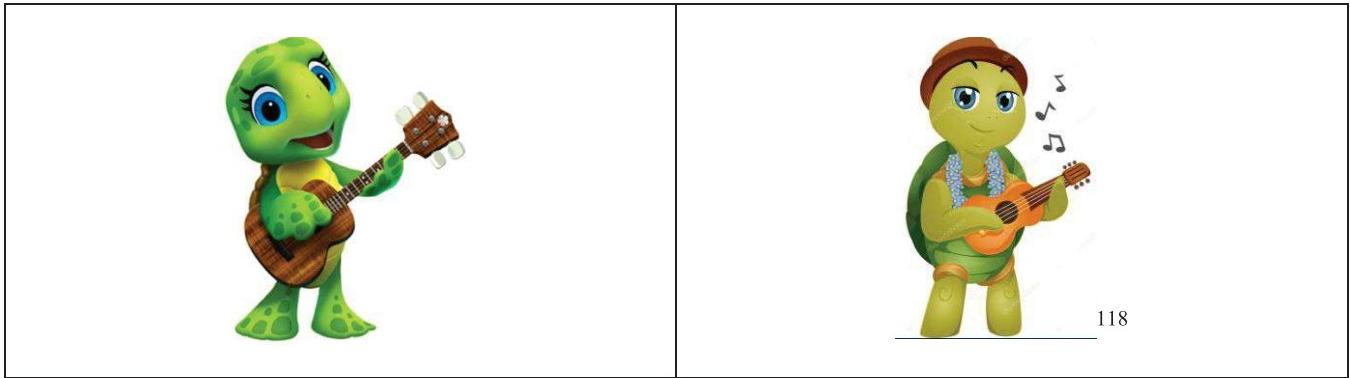
The examples below, both of which were uploaded in 2015, reflect an **anthropomorphized turtle** with **blue eyes** with a **green body** playing a **stringed instrument**. One has **prominent eyelashes**, similar to Honu, and the other wears a lei, reflecting an **association with Hawaii**.



¹¹⁵ <https://www.usff.navy.mil/Community-Outreach/US-Navy-Stewards-of-the-Sea/Meet-Stewie/>

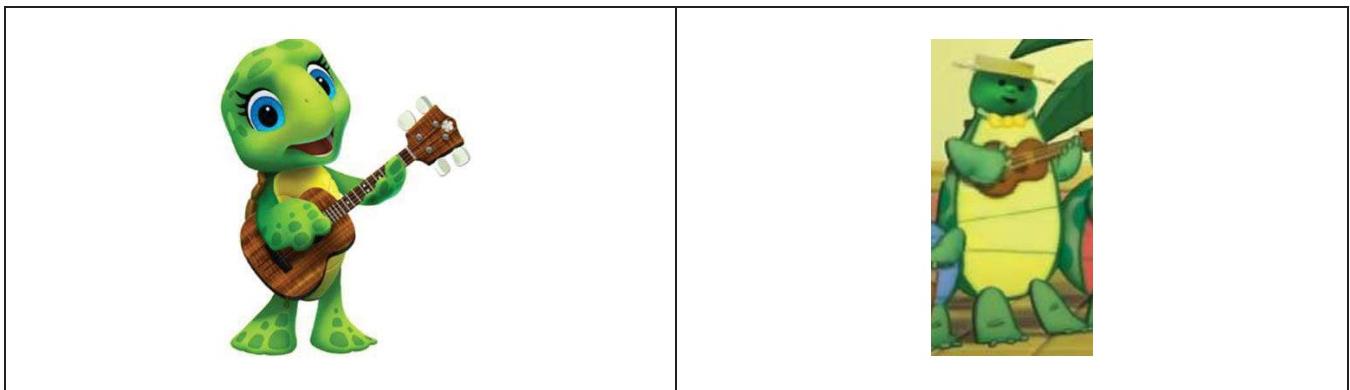
¹¹⁶ <https://www.usff.navy.mil/Community-Outreach/US-Navy-Stewards-of-the-Sea/Meet-Stewie/igphoto/2002479911/igphoto/2002479914/>

¹¹⁷ <https://www.shutterstock.com/image-vector/cartoon-turtle-playing-guitar-342388145> (2015)



7. Lance the Turtle Video

A 2006 video from VeggieTales features an **anthropomorphized green turtle with a yellow belly with three horizontal stripes** in a **Hawaiian setting** playing a **ukulele**:



VII. CONCLUSION

In conclusion, it is my opinion, based on my review of the materials, research into existing characters and properties in the genre, and knowledge of the field of children's media based on my thirty years in the field, that 'Olu Mel clearly could, and seems to, have been the result of independent creation.

The shared physical attributes of the characters' appearances identified by the Plaintiffs – anthropomorphized turtles, with green coloring, blue eyes, and spotting – are seen in multiple other turtle characters in the genre. The style of animation seen in Plaintiffs' character is of a CGI 3D style that is ubiquitous in children's animation, particularly in Pixar works.

Moreover, even the combination of traits that are shared by Honu and 'Olu Mel are not original to Plaintiffs. As I discussed in my report, various combinations of the elements claimed by Plaintiffs are seen in other popular characters in the genre and predate Plaintiffs' images.

Even if Honu and 'Olu Mel were to share the general idea or concept of being a blue-eyed turtle that plays the ukulele, the traits that are shared between Honu and 'Olu Mel are starkly different in their

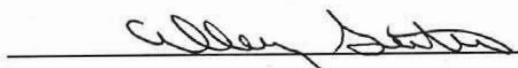
¹¹⁸ <https://depositphotos.com/illustration/turtle-playing-ukelele-94051166.html> (2015)

actual expression, as I outlined section 3. Differences in the animation style, color palette, dimensions and shapes, including specific features like nose shape, limbs, freckles/spotting, shell design and clothing all reflect significantly different visual expression.

It is also my opinion that Honu and 'Olu Mel do not share any original conceptual similarities. The conceptual similarities they do share are not original to Plaintiffs, and in fact are common place in children's media. Elements like a joyful and uplifting personality, love of music, and focus on friendship flow naturally from the concept and are seen widely across the genre. Indeed, there are also significant conceptual differences between Honu and 'Olu Mel. The plot and themes of all of Plaintiff's Honu materials reflect a focus on environmental conservation, which does not appear at all in 'Olu Mel's backstory, or any related Duffy and Friends materials that I reviewed. 'Olu Mel's character is described as shy, but his focus on music is his most notable personality characteristic. 'Olu Mel's backstory describes his introduction to Mickey and Duffy and entrance into their group of friends, whereas Honu does not appear to have a backstory of his own. In the musical scripts provided by Plaintiffs, the sea turtle character, Malia, does not play an instrument or express a particular love for music. While Honu is depicted with a ukulele in some of Plaintiffs' materials (all of which I understand post-date Defendants' depiction of 'Olu Mel with a ukulele), there are no story elements I am aware of that involve Honu's personality, beyond the highly generic qualities of positivity and friendliness.

I believe the generic elements identified by Plaintiffs are not protectable, as they are commonplace in the children's entertainment genre and not original to Plaintiffs. The depiction of a character associated with Hawaii who plays the ukulele is not original to Plaintiffs, as it appears in previous works created by Disney as well as other works in the genre, and the association of a ukulele with Hawaii flows naturally from the subject. Spots and blue eyes are seen in many examples of children's turtle characters. And, again, the expression of those elements differs greatly between Honu and 'Olu Mel.

Executed on November 22, 2024.



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Professor, Department of Communication, University of California, San Diego, 1995-2003

Professor of Telecommunications and Director of Graduate Studies, Department of
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Associate Professor of Telecommunications and Film, University of Oregon, Eugene, 1987-
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Ph.D., Northwestern University, Radio-TV-Film, 1981.

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Books

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Jury Member, American Film Institute, Ten Best of the Year. 2022, 2020, 2018, 2015, 2013.

Society for Cinema and Media Studies Award for Career Achievement in Pedagogy, 2017.

Jury Member and Keynote Speaker , Golden Panda Short Film Festival, 2017.

Keynote Speaker, Anime Expo, Los Angeles, 2016.

Advisor, Digital Kids Project, MacArthur Foundation, 2005-2016.

Awarded San Diego Board of Education Community Service Award 2004; Normal Heights Community Association Outstanding Community Service Award 2001; 2002; 2003; 2004.

Conference Organizer, "Media and Communication in the New Global Economy: A conference in honor of Professor Herbert Schiller, October 2-3 1999, funded by the UCSD Chancellor's Associates.

Conference Coordinator, 1998 Society for Cinema Studies, special focus "Media on the Border."

Executive Council, Society for Cinema and Media Studies, 1997-9.

Founding Board Member, Console-ing Passions: Television, Video, Feminism, 1995-1999.

Awarded Spirit of Service Award, Lane County Relief Nursery, 1988,1989.

Editorial

Founding Co-Editor, International Journal of Learning and Media, MIT Press, 2010-2012.

The MacArthur Report Series in Digital Media and Learning are commissioned white papers focusing on concepts and topic areas key to the understanding of digital media and learning. The series is published by the Digital Media and Learning Research Hub and by MIT Press and edited by Ellen Seiter. Recent titles below:

Antero Garcia Et Al. **Teaching In The Connected Learning Classroom**
<http://dmlhub.net/publications/teaching-connected-learning-classroom>

Lissa Soep: **Participatory Politics** <http://dmlhub.net/publications/participatory-politics>

Sheryl Grant What Counts As Learning <http://dmlhub.net/publications/what-counts-learning>

Becca Kinskey: **We Used To Wait: Music Videos And Creative Literacy**
<http://dmlhub.net/publications/we-used-wait>

Co-Editor, International Journal of Learning and Media, MIT Press, 2010-2012.

Co-Editor (with Mimi Ito), Book Series: Technologies of the Imagination, University of Michigan Press, 2008-2012; Culture and Communication book series, Rutgers University Press, 1997-2003.

Journal Editorial Board member: Global Storytelling Girlhood Studies, Media Industry, Television and New Media, International Journal of Communication, European Journal of Cultural Studies, Journal of Children and Media, Cultural Studies; Feminist Media Studies, New Media and Society, Journal of Broadcasting and Electronic Media, and Ethnography.

Professional Consulting

External Reviewer: London School of Economics; Indiana University; Georgetown University; University of Michigan; University of Minnesota; New York University; George Washington University, University of California, Berkeley, MIT School of Humanities.

Bayerischer Rundfunk (Bavarian Television, Munich) Institute for the Study of Children and Television.

Mattel Corporation, Project Platypus.

Interval Research Corporation, Forum speaker

Sega of America: Parents Advisory Council

Microsoft Corporation, Kids Network Advisory Council

Grants:

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